APPEAL NO. 141892
FILED OCTOBER 24, 2014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 29, 2014, in San Antonio, Texas, with [hearing officer] by presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury extends to tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, an aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of the C5-6 disc displacement, aggravation of cervical disc disorder/herniations at C4-5 and C5-6, cervical instability at C4-5, and aggravation of degenerative disc disease; and (2) the respondent's (claimant) impairment rating (IR) is 23%.

The appellant (carrier) appealed both of the hearing officer's determinations, contending that the hearing officer committed legal and factual errors. The claimant responds, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a cervical strain, a left ankle sprain, a left shoulder rotator cuff tear and labral tear, a bicepital/biceps tendon tear, and left medial meniscus tear on [Date of Injury]. It was undisputed that the claimant reached maximum medical improvement (MMI) statutorily on January 13, 2013. The claimant testified he was injured when he stood and hit the top of his head on a rafter and rolled approximately 18 feet down a sloped roof. The claimant testified that he did not actually fall to the ground.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury extends to tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, an aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of cervical disc disorder/herniations at C4-5 and C5-6, and cervical instability at C4-5 is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury extends to aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease.

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. *See* Appeals Panel Decision (APD) 022301, decided October 23, 2002. *See also Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony must be based on reasonable medical probability. *City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Insurance Company of North America v. Meyers*, 411 S.W.2d 710, 713 (Tex. 1966).

In this case aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease require expert evidence to establish a causal connection with the compensable injury.

The hearing officer relied upon a causation letter dated April 6, 2014, from (Dr. G), the claimant's treating doctor. However, Dr. G did not discuss aggravation of the C5-6 disc displacement or aggravation of degenerative disc disease in this letter. There is no other letter from Dr. G in evidence discussing these conditions, nor is there any letter from any other doctor in evidence that explains how the compensable injury caused these conditions. Accordingly, we reverse that portion of the hearing officer's determination that the compensable injury extends to aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease, and we render a new decision that the compensable injury does not extend to those conditions.

At the CCH the claimant sought to add additional conditions to the disputed extent-of-injury issue. Specifically, the claimant requested, with no objection from the carrier, that the hearing officer add the condition of an aggravation of cervical disc disorder/herniation at C6-7 to the claimed conditions. The hearing officer granted the claimant's request. However, the hearing officer noted the extent-of-injury issue in her decision as follows:

> Does the compensable injury of [Date of Injury], extend to tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, an aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of the C5-6 disc displacement, aggravation of cervical disc disorder/herniations at C4-5, C5-6, cervical instability at C4-5, and aggravation of degenerative disc disease?

The hearing officer did not include the condition of an aggravation of cervical disc disorder/herniation at C6-7 in the issue statement, nor did the hearing officer discuss or make findings of fact, conclusions of law, or a decision regarding an aggravation of cervical disc disorder/herniation at C6-7, which was an issue properly before her. Accordingly, we reverse the hearing officer's extent-of-injury determination as incomplete, and we remand the issue of whether the compensable injury of [Date of Injury], extends to an aggravation of cervical disc disorder/herniation at C6-7. See APD 130611, decided May 1, 2013.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant's IR is 23% as certified by (Dr. H), the referral doctor.

Dr. H examined the claimant on February 26, 2013, and certified that the claimant reached MMI statutorily on January 13, 2013, with a 23% IR. Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. H placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment for 5% impairment for the claimant's cervical spine. Dr. H also assessed 4% whole person impairment (WPI) based on range of motion (ROM) measurements taken of the claimant's left shoulder. Dr. H found decreased ROM measurements of the claimant's left ankle which resulted in 3% impairment, but noting that the claimant's injury "requires routine use of a short leg brace (ankle-foot orthosis [AFO])," Dr. H assigned a 15% WPI using Table 36 on page 3/76 of the AMA Guides for gait derangement. Dr. H additionally assigned a 1% impairment using Table 64 on page 3/85 for a partial medial meniscectomy.

Dr. H stated in his narrative report that regarding the lower extremity under Section 3.2 of the AMA Guides, "[i]n general, only one evaluation method should be

used to evaluate a specific impairment. However, in some instances, a combination of two or three methods may be required."

Page 3/75 of the AMA Guides states under Section 3.2b Gait Derangement that "[t]he lower limb impairment percents shown in Table 36 [relating to gait derangement] should stand alone and should *not* (emphasis original) be combined with those given in other parts of Section 3.2."

In APD 033193, decided February 3, 2004, the designated doctor combined a 20% impairment for moderate severity gait derangement and a 3% impairment for medial meniscectomy under Table 64 of the AMA Guides. The hearing officer in that case rejected the designated doctor's IR because the designated doctor improperly combined an IR assigned for gait derangement with impairment assigned in Table 64 for the meniscectomy procedure. The Appeals Panel noted the above quote from the AMA Guides, and stated that the hearing officer in that case correctly found that the IR for gait derangement should not be combined with other IRs for the lower extremity.

In the case on appeal, Dr. H misapplied the AMA Guides in assessing the claimant's IR by improperly combining 15% impairment assigned for gait derangement with 1% impairment assigned for the claimant's partial medical meniscectomy. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 23%.

There is only one other MMI/IR certification in evidence with the stipulated MMI date of January 13, 2013, which is from (Dr. B), the designated doctor appointed by the Division to determine MMI, IR, and extent of the compensable injury. Dr. B examined the claimant on January 6, 2014, and certified that the claimant reached MMI statutorily on January 13, 2013, with an 11% IR. In his narrative report Dr. B noted diagnoses of a neck sprain, a left knee sprain with partial medial meniscectomy, a left shoulder sprain, and a left ankle sprain, as well as a left shoulder rotator cuff tear, labral and long biceps tendon tear, and a left knee medial meniscus tear. As discussed above we have affirmed the hearing officer's determination that the compensable injury extends to tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, an aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of cervical disc disorder/herniations at C4-5 and C5-6, and cervical instability at C4-5. Dr. B has not considered and rated the entire compensable injury. Furthermore, we have reversed and remanded the issue of whether the compensable injury extends to an aggravation of cervical disc disorder/herniation at C6-7. Accordingly, Dr. B's 11% IR cannot be adopted.

There is no other MMI/IR certification in evidence with the undisputed January 13, 2013, date of MMI. Accordingly, we remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury extends to tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, an aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of cervical disc disorder/herniations at C4-5 and C5-6, and cervical instability at C4-5.

We reverse the hearing officer's determination that the compensable injury extends to an aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease, and we render a new decision that the compensable injury does not extend to an aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease.

We reverse the hearing officer's decision as incomplete, and we remand the issue of whether the compensable injury of [Date of Injury], extends to an aggravation of cervical disc disorder/herniation at C6-7.

We reverse the hearing officer's determination that the claimant's IR is 23%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. The hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor for MMI/IR. If Dr. B is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and the IR.

The hearing officer is to make a determination which is supported by the evidence on whether the [Date of Injury], compensable injury extends to aggravation of cervical disc disorder/herniation at C6-7. Once the hearing officer determines whether the compensable injury of [Date of Injury], extends to an aggravation of cervical disc disorder/herniation at C6-7, the hearing officer is to inform the designated doctor of that determination. The hearing officer is also to inform the designated doctor that the [Date of Injury], compensable injury extends to a cervical strain, a left ankle sprain, a left shoulder rotator cuff tear and labral tear, bicepital/biceps tendon tear, a left medial

meniscus tear, tears of the talofibular, deltoid, fibiocalcaneal ligaments, tears of the flexor halluces longus and peroneal tendons, aggravation of the tibiotalar joint arthritis with mechanical bony impingement of the left ankle, aggravation of cervical disc disorder/herniations at C4-5 and C5-6, and cervical instability at C4-5. The hearing officer is also to inform the designated doctor that the [Date of Injury], compensable injury does not extend to an aggravation of the C5-6 disc displacement and aggravation of degenerative disc disease.

The hearing officer is further to inform the designated doctor that the date of MMI in this case is January 13, 2013, as previously discussed. The hearing officer is to request the designated doctor rate the claimant's entire compensable injury as of the January 13, 2013, date of MMI in accordance with the AMA Guides considering the medical record and the certifying examination. The parties are to be provided with any new MMI/IR certification and allowed an opportunity to respond.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge